No. 80-1813

FILED

MAY 29 198

ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

OREST T. DUBNO, Commissioner of Revenue Services of the State of Connecticut, et al., *Petitioners*,

v.

MOBIL OIL CORPORATION, AMOCO OIL COMPANY, GETTY REFINING AND MARKETING COMPANY, GULF OIL CORPORATION, SUN OIL COMPANY OF PENNSYLVANIA, ATLANTIC RICHFIELD COMPANY, CHEVRON U.S.A. INC., EXXON CORPORATION AND SHELL OIL COMPANY, *Respondents*.

CARL R. AJELLO, Attorney General of the State of Connecticut, et al., *Petitioners*,

v.

TEXACO INC., *Respondent*.

ELLA T. GRASSO, Govenor of the State of Connecticut, et al., *Petitioners*,

v.

AMERADA HESS CORPORATION, *Respondent*.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

---

RESPONDENTS' JOINT BRIEF IN OPPOSITION

[Counsel Listed On Inside Cover]

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

WILLIAM E. GLYNN
One Constitution Plaza
Hartford, CT 06103
(203) 278-1330

Counsel of Record For
Mobil Oil Corporation
Amoco Oil Company
Getty Refining and
Marketing Company
Gulf Oil Corporation
Sun Oil Company of
Pennsylvania
Atlantic Richfield Company
Chevron U.S.A. Inc.
Exxon Corporation
Shell Oil Company

FRANCIS J. McNAMARA, JR.
10 Stamford Forum
Stamford, CT 06904
(203) 327-1700
Counsel of Record For
Texaco Inc.

MYRON C. BAUM
1101 17th St. N.W.
Washington, D.C. 20036
(202) 862-5000
Counsel of Record For
Amerada Hess Corporation

QUESTIONS PRESENTED*

1. Did the Court of Appeals for the Second Circuit correctly hold that the Temporary Emergency Court of Appeals had exclusive jurisdiction to decide whether section 13(b) of Connecticut Public Act No. 80-71 is preempted by the federal Emergency Petroleum Allocation Act?

2. Did the Court of Appeals for the Second Circuit correctly hold that the Temporary Emergency Court of Appeals had exclusive jurisdiction to determine whether the District Court correctly decided that the abstention doctrine should not be applied in this case?

3. Did the Court of Appeals for the Second Circuit correctly conclude that this action was not barred by 28 U.S.C. §1341?

---

* Respondents' listing pursuant to Rule 28.1 is contained in a separate appendix.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	5
ARGUMENT	5
I. This Case Does Not Warrant Review	5
II. The Court Of Appeals Was Entirely Correct In Dismissing The Petitioners' Appeal On The Issues Of Preemption And Abstention	7
A. The Temporary Emergency Court Of Appeals Had Exclusive Jurisdiction Over The Preemption Issue	7
B. The Temporary Emergency Court Of Appeals Had Exclusive Jurisdiction Over The Abstention Issue	13
III. The Appeals Court Properly Held That 28 U.S.C. §1341 Did Not Bar The District Court Actions	15
IV. Petitioners' Failure To File A Timely Appeal With The Temporary Emergency Court Of Appeals Does Not Warrant Extraordinary Relief By This Court	15
CONCLUSION	19

PRECEDING PAGE WAS BLANK

TABLE OF AUTHORITIES

CASES: PAGE

A.F.L. v. *Watson*, 327 U.S. 582 (1946) 9

ARCO v. *Tribbit*, 399 A.2d 535 (Del. Ch. 1977) 13

Bray v. *U.S., 423 U.S. 73 (1975)* 7, 14

Butler v. *Dexter*, 425 U.S. 262 (1976) 17

Chicago and Northwestern Transportation Co. v. *Kalo Brick & Tile Co.*, 49 U.S.L.W. 4232 (1981) 12

Citronelle-Mobile Gathering, Inc. v. *Gulf Oil Corp.*, 591 F.2d 711 (TECA), *cert. denied*, 444 U.S. 879 (1979) 6, 8, 10, 12

City of Burbank v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973) 9

City of New York v. *New York Tel. Co.*, 468 F.2d 1401 (TECA 1972) 14

Coastal States Marketing, Inc. v. *New England Petro. Corp.*, 604 F.2d 179 (2d Cir. 1979) 6, 7, 8, 10, 16

Gully v. *Interstate Natural Gas Co.*, 292 U.S. 16 (1934) 17, 18

Harman v. *Forssenius*, 380 U.S. 528 (1965) 14

Harris Truck Lines v. *Cherry Meat Packers*, 371 U.S. 215 (1962) 16

International Ladies' Garment Workers' Union v. *Donnelly Garment Co.*, 304 U.S. 243 (1938) 17, 18

Ivy Broadcasting Co. v. *AT&T*, 391 F.2d 486 (2d Cir. 1968) 12

Jones v. *Rath Packing Co.*, 430 U.S. 519 (1977) 11

MTM Inc. v. *Baxley*, 420 U.S. 799 (1975) 17

Maryland v. *Exxon Corp.*, 370 A.2d 1102 (Md. 1977), *aff'd* 437 U.S. 117 (1978) 13

Mitchell v. *Donovan*, 398 U.S. 427 (1970) 17

Mobil Oil Corp. v. *Dubno*, 492 F.Supp. 1004 (D. Conn. 1980) 3, 9, 11, 13, 15

Table of Authorities Continued

CASES: PAGE

Mobil Oil Corp. v. *Dubno*, 639 F.2d 919 (2d Cir. 1981) 4, 9, 10, 13, 14, 15

Mobil Oil Corp. v. *Tully*, 499 F.Supp. 888 (N.D.N.Y. 1980) 3, 16

Mobil Oil Corp. v. *Tully*, 639 F.2d 912 (2d Cir. 1981) ... 10

Mountain Fuel Supply Co. v. *Johnson*, 586 F.2d 1375 (10th Cir. 1978), *cert. denied*, 441 U.S. 952 (1979) 6, 8, 10, 12

M. Spiegel & Sons Oil Corp. v. *B.P. Oil Corp.*, 531 F.2d 669 (2d Cir. 1976) 6, 8, 10, 12

Oklahoma Gas & Electric Co. v. *Oklahoma Packing Co.*, 292 U.S. 386 (1934) 17, 18

Phillips v. *U.S.*, 312 U.S. 246 (1941) 17

Quincy Oil Inc. v. *F.E.A.*, 620 F.2d 890 (TECA 1980) .. 14

Railroad Commission v. *Pullman*, 312 U.S. 496 (1941) .. 13

Reed v. *Kroger Co.*, 478 F.2d 1268 (TECA 1973) 17

Shulthis v. *McDougal*, 225 U.S. 561 (1912) 12

Standard Oil Co. v. *D.O.E.*, 596 F.2d 1029 (TECA 1978) 14

Swift & Co. v. *Wickham*, 382 U.S. 111 (1965) 9

T.B. Harms Co. v. *Eliscu*, 339 F.2d 823 (2d Cir. 1964), *cert. denied*, 381 U.S. 915 (1965) 12

Texaco Inc. v. *D.O.E.*, 616 F.2d 1193 (TECA 1979) 6, 8, 10

U.S. v. *Cooper*, 482 F.2d 1393 (TECA 1973) 16

U.S. v. *Corrick*, 298 U.S. 435 (1936) 17, 18

U.S. v. *Robinson*, 361 U.S. 220 (1960) 16

William Jameson & Co. v. *Morgenthau*, 307 U.S. 171 (1939) 17, 18

Table of Authorities Continued

STATUTES: PAGE

Economic Stabilization Act of 1970 (ESA), P.L. 91-379, 12 U.S.C. §1904 note 7, 16

Emergency Petroleum Allocation Act of 1973 (EPAA), P.L. 93-159, 15 U.S.C. §§751-760h ..... *passim*

Tax Injunction Act, 28 U.S.C. §1341 ..... 3, 4, 5, 15

28 U.S.C. §1253 17

28 U.S.C. §2281 15

42 U.S.C. §6421 10

Act Concerning State Revenue for the Fiscal Year Commencing July 1, 1980, Conn. Public Act No. 80-71, codified at Conn. Gen. Stat. §§12-587 to 12-602 (1981) ..... *passim*

ADMINISTRATIVE ACTIONS:

41 Fed. Reg. 40452 (1976) 11

MISCELLANEOUS:

Hearings before Conn. Finance, Revenue and Bonding Committee, January 29, 1980 2

Transcript of Debate in Conn. House of Representatives, April 11, 1980 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1813

OREST T. DUBNO, Commissioner of Revenue Services of the State of Connecticut, et al., *Petitioners,*

v.

MOBIL OIL CORPORATION, AMOCO OIL COMPANY, GETTY REFINING AND MARKETING COMPANY, GULF OIL CORPORATION, SUN OIL COMPANY OF PENNSYLVANIA, ATLANTIC RICHFIELD COMPANY, CHEVRON U.S.A. INC., EXXON CORPORATION AND SHELL OIL COMPANY, *Respondents.*

CARL R. AJELLO, Attorney General of the State of Connecticut, et al., *Petitioners,*

v.

TEXACO INC., *Respondent.*

ELLA T. GRASSO, Govenor of the State of Connecticut, et al., *Petitioners,*

v.

AMERADA HESS CORPORATION, *Respondent.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENTS' JOINT BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Connecticut Public Act No. 80-71 became effective on July 1, 1980. Section 1 of that Act imposed a two precent tax on the "gross earnings" derived by integrated petroleum companies from sales of petroleum products in Connecticut. Respondents are all subject to the tax, and they have been paying the tax as it has fallen due.

In addition to imposing a tax on Respondents, the Act also contained a provision designed to control the prices of certain petroleum products sold in Connecticut. That provision, section 13(b) of the Act, Pet. App. 45a, prohibited any petroleum company subject to the tax imposed by section 1 of the Act from raising its wholesale price in Connecticut for any product exempt from the Emergency Petroleum Allocation Act of 1973 (P.L. 93-159, 15 U.S.C. §§751-760h) ("EPAA") by more than the average increase in its wholesale price for that product in all ports on the eastern coast of the United States. The obvious and explicit purpose of this price control provision was to force the Respondents to recover the cost of the new tax, to the extent that market forces allowed them to recover it at all, in their prices throughout the eastern United States.[1] The legislature

---

[1] "I think [in] making some of our fellow Americans in Louisiana and in the southeast and the oil-producing states[,] which both in terms of their economy and in terms of their revenues have reached [sic] an extraordinary bounty at our detriment [pay the Connecticut tax] . . . I've invented an idea which makes sense in terms of fundamental fairness and it makes sense in terms of practicality." Tr. of hearings before the Finance, Revenue and Bonding Committee, January 29, 1980 at 8 (remarks of Sen. Curry). *See also* Tr. of debate in the Connecticut House of Representatives, April 11, 1980, at 154 (comment of Rep. Lavine) ("Frankly, Mr. Speaker, I'm supportive of taxing the oil companies, I'm just not supportive of passing that tax through to the citizens of Connecticut.")

realized, as the District Court found, 492 F. Supp. at 1006, Pet. App. 9a, that in the absence of a provision such as section 13(b) the cost of the gross receipts tax would ordinarily be passed on to consumers in the state that imposed the tax.

Respondents sought declaratory and injunctive relief in the District Court from enforcement of the price control provisions of the Act. They did not challenge the tax imposed by the Act. Respondents claimed in District Court that the price control provision was preempted by the EPAA and was repugnant to the Commerce Clause and to the Due Process Clause of the United States Constitution.

Without reaching the constitutional claims, the Court held that section 13(b) was in conflict with the federal energy policy established by the EPAA and the implementing regulations issued thereunder and therefore preempted under the Supremacy Clause of the United States Constitution. As befits any preemption analysis, the District Court reached its decision after engaging in a thorough analysis of the applicable provisions of the EPAA, its legislative history and the regulations promulgated thereunder. 492 F. Supp. at 1006-09, 1011-15; Pet. App. 11a-15a, 19a-27a. The District Court denied *sub silentio* the Petitioners' motion to dismiss which was based on the doctrine of abstention and the Tax Injunction Act, 28 U.S.C. §1341.

On August 11, 1980, the last day possible, Petitioners appealed the judgment of the District Court to the United States Court of Appeals for the Second Circuit. During the pendency of that appeal, the District Court for the Northern District of New York rendered its decision in the case of *Mobil Oil Corp.* v. *Tully,* 499 F. Supp. 888 (N.D.N.Y. 1980), a case involving a New

York price control provision similar to the price control provision in the Connecticut statute. The New York State defendants in *Tully* also appealed to the Second Circuit, and the two appeals were treated as companion cases by the Court of Appeals.

Respondents moved to dismiss the appeal on the ground that the Temporary Emergency Court of Appeals ("TECA") had exclusive jurisdiction over the appeal. Similar motions were filed in the companion case. The Court of Appeals held that the TECA had exclusive jurisdiction to review the merits of the District Court's holding as to preemption and to consider the Petitioners' claim that the District Court should have abstained. Accordingly, the Court of Appeals dismissed the appeal as to those claims. The Court of Appeals held that it did have jurisdiction to consider the claim that the District Court judgment was barred by 28 U.S.C. §1341 and affirmed the District Court on that issue. 639 F.2d 919, Pet. App. 1a.

The New York defendants in the companion case proceeded to present their claims on the merits of the District Court's judgment to the TECA.[2] The Connecticut defendants did not file a notice of appeal with the TECA and therefore proceeded by means of their petition for certiorari in this Court. While the New York defendants have also sought review in this Court, their petition is limited to the District Court's holding that section 1341 did not bar the New York action.

---

[2] The TECA heard arguments on the merits in the New York case on April 2, 1981. The New York defendants had not raised an abstention claim.

SUMMARY OF ARGUMENT

The Court of Appeals correctly determined that exclusive appellate jurisdiction of an issue arising under the EPAA rests with the TECA. On that issue, there is no conflict or disagreement among the lower courts, nor is there any apparent reason for review by this Court. Similarly, there is no disagreement among lower courts that two of the issues determined by the District Court, preemption of a state statute by the EPAA and the applicability of the abstention doctrine to a claim that a state statute is preempted by the EPAA, were issues arising under the EPAA. The determinations below are consistent with the decisions of this Court.

The Court of Appeals correctly decided that the Tax Injunction Act, 28 U.S.C. §1341, is inapplicable where the tax is being paid and collected and is not under challenge.

Since the judgments below were plainly correct, there is no justification for vacating those judgments in order to relieve Petitioners of the consequences of their failure to follow proper appellate procedure.

ARGUMENT

I. This Case Does Not Warrant Review

The principal question presented by this case is whether the Court of Appeals correctly held that it did not have appellate jurisdiction to review the preemption and abstention issues presented to it by the Petitioners.[3]

[3] The minimal attention Petitioners devote to their argument that the Court of Appeals erred in rejecting their claims with regard to section 1341, Pet. 21, is a tacit admission that their argument is, to say the least, weak. Review of the section 1341 argument is clearly not warranted. *See* p. 15, *infra*.

That question does not warrant review by this Court. No issue of national significance would be resolved by granting certiorari in this case because no issue of national significance is presented, and no conflict among the lower federal courts would be settled because none exists.

The allocation of jurisdiction between the TECA and the courts of appeals is not a matter of dispute among the lower courts. Rather, the courts of appeals and the TECA have agreed that the TECA has exclusive appellate jurisdiction to review adjudications of "EPAA issues" by a district court. Neither the courts of appeals nor the TECA have had any difficulty in identifying such issues. *See Texaco Inc.* v. *D.O.E.*, 616 F.2d 1193 (TECA 1979); *Coastal States Marketing, Inc.* v. *New England Petroleum Corp.*, 604 F.2d 179 (2d Cir. 1979); *Citronelle-Mobile Gathering, Inc.* v. *Gulf Oil Corp.*, 591 F.2d 711 (TECA), *cert. denied*, 444 U.S. 879 (1979); *Mountain Fuel Supply Co.* v. *Johnson*, 586 F. 2d 1375 (10th Cir. 1978), *cert. denied*, 441 U.S. 952 (1979); *M. Spiegel & Sons Oil Corp.* v. *B.P. Oil Corp.*, 531 F.2d 669 (2d Cir. 1976).

Although Petitioners claim that there is a conflict between the decision below and decisions of the TECA and of this Court, Pet. 6, they do not identify any such conflict. All Petitioners do is indicate that both the TECA and this Court have recognized that the TECA's jurisdiction is limited. Nothing in the decision below conflicts with this principle. The Court below simply held that under the standards that all courts have adopted to define the extent of the TECA's limited jurisdiction, the preemption and abstention issues involved in this case can be heard on appeal only by the TECA.

There is also no unresolved question of national importance presented by this petition. Petitioners' challenge to the jurisdictional decision of the Court of Appeals is necessitated solely by Petitioners' failure to follow the clear advice of the Court of Appeals that litigants file dual notices of appeal in cases involving EPAA issues. *See Coastal States Marketing, Inc.* v. *New England Petroleum Corp., supra,* 604 F.2d at 186 n.9. In short, this petition presents a case of significance only to the parties.

II. The Court Of Appeals Was Entirely Correct In Dismissing The Petitioners' Appeal On The Issues Of Preemption And Abstention

A. The Temporary Emergency Court of Appeals had exclusive jurisdiction over the preemption issue

Section 5(a)(1) of the EPAA, codified in 15 U.S.C. §754(a)(1)(A), incorporates the judicial review provisions of the Economic Stabilization Act of 1970, P.L. 91-379, 84 Stat. 796 ("ESA"), by providing that those judicial review provisions shall apply to any regulation, order, or action taken by the President (or his delegate) under the EPAA "as if such regulation had been promulgated, such order had been issued, or such action had been taken under the Economic Stabilization Act of 1970." Section 211(b)(2) of the ESA, 12 U.S.C. §1904 note, provides that the TECA has "exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under [the ESA] or under regulations or orders issued thereunder."[4]

---

[4] Section 211(b)(2) "carved out a limited exception to the broad jurisdiction of the courts of appeals" the purpose of which is "to assure uniform interpretation . . ." of the energy laws. *Bray* v. *United States,* 423 U.S. 73, 74-75 (1975).

The Court of Appeals' analysis and conclusion that the TECA had exclusive jurisdiction over the issue of whether the EPAA preempts section 13(b) are fully consistent with the line of authority that has defined the TECA's jurisdiction. Petitioners concede the basic premise that the TECA's exclusive jurisdiction includes cases that arise under the EPAA. Pet. 7,8. They focus instead upon the issue of whether the present case is one "arising under" the EPAA. The standard for such an inquiry is clear — the court must decide "whether an EPAA question has been adjudicated." *Texaco Inc* v. *D.O.E., supra,* 616 F.2d at 1198, *citing Coastal States Marketing, Inc.* v. *New England Petroleum Corp., supra,* 604 F.2d at 187. If it has, the TECA has exclusive jurisdiction over that EPAA issue and the appropriate Court of Appeals has jurisdiction over other substantive issues in the same case. *Coastal States Marketing, Inc.* v. *New England Petroleum Corp., supra,* 604 F.2d at 182.

The standard for determining whether an EPAA question has been adjudicated has also been clearly delineated. An EPAA question is adjudicated if the case has required "application and interpretation of the EPAA . . . ." *Citronelle-Mobile Gathering, Inc.* v. *Gulf Oil Corp., supra,* 591 F.2d at 716. *See also, Mountain Fuel Supply Co.* v. *Johnson, supra* (exclusive jurisdiction in the TECA where the "construction, applicability and effect" of the EPAA is involved); *M. Spiegel & Sons Oil Corp.* v. *B.P. Oil Corp., supra* ("construction of the EPAA" required). Under this standard the TECA's exclusive jurisdiction in the present case is apparent because the District Court's decision on the preemption issue embodies an extensive construction and interpretation of the EPAA.

In preemption cases the court's analytical duty "is never one of interpretation of the Federal Constitution but inevitably one of comparing two statutes." *Swift & Co.* v. *Wickham,* 382 U.S. 111, 120 (1965). Such cases turn on the peculiarities and special features of the federal statute or regulation involved. *See City of Burbank* v. *Lockheed Air Terminal, Inc.,* 411 U.S. 624, 638 (1973). For this reason, preemption cases have uniformly been held to "arise under" the preempting statute, not under the Supremacy Clause. *See, e.g., Swift & Co.* v. *Wickham, supra; A.F.L.* v. *Watson,* 327 U.S. 582, 591 (1946).

Thus, it was absolutely necessary for the District Court to become, as it did, intricately involved in the construction and interpretation of the EPAA, its legislative history and the regulations promulgated thereunder, in order to decide that section 13(b) was preempted. 492 F.Supp. at 1006-09, 1011-15, Pet. App. 11a-15a, 19a-27a. Reviewing that decision, the Court of Appeals reached the only conclusion it could:

> Because this decision [the district court's] necessarily involved a thorough analysis of the EPAA and the Mandatory Price Regulations . . . the district judge adjudicated an ESA (EPAA) issue and, therefore, exclusive jurisdiction over this part of the case lies with TECA pursuant to 15 U.S.C. §754(a)(1).

639 F.2d at 921, Pet. App. 5a.

Petitioners rely on a number of unsupportable assertions in an effort to obscure the plain validity of the Court of Appeals decision. Each of their claims was considered by the Court of Appeals and properly rejected.

First, the Petitioners charge that the Court of Appeals "completely ignored" their claim that this case

arose under the EPAA itself and not under a "regulation promulgated under section 753(a) [of the EPAA], . . . any order under [the EPAA], [or] any action taken by the President (or his delegate) under [the EPAA]," as is required by the jurisdictional provision of section 754(a)(1)(A). Pet. 7. The fact is that the Court of Appeals did consider this argument and flatly rejected it. *Mobil Oil Corp.* v. *Tully, supra,* 639 F.2d at 916, Pet. App. 36a-37a.

Moreover, the extremely narrow interpretation of the jurisdictional provision of section 754(a)(1)(A) urged by Petitioners is contrary to the uniform interpretation given this provision by the courts of appeals and the TECA.[5] In addition, the "regulation promulgated under Section 753(a) of [the EPAA]" referred to in §754(a)(1)(A) includes not only the original program of price controls but also the exemptions therefrom, exemptions which are accomplished by amendment to "the regulations". 15 U.S.C. §760a(b). Respondents' preemption claim in the District Court plainly arose under the regulations because it hinged on the interpretation accorded the exemption process. The exemptions also constitute "actions" and "orders taken by the President (or his delegate) under this chapter" within the meaning of section 754(a)(1)(A). *See* 15 U.S.C. §§760(b)(2), 760a(b).[6]

---

[5] *See Texaco Inc.* v. *D.O.E., supra,* 616 F.2d at 1195; *Coastal States Marketing, Inc.* v. *New England Petroleum Corp., supra,* 604 F.2d at 182; *Citronelle-Mobile Gathering, Inc.* v. *Gulf Oil Corp., supra,* 591 F.2d at 715; *Mountain Fuel Supply Co.* v. *Johnson, supra,* 586 F.2d at 1379; *M. Spiegel & Sons Oil Corp.* v. *B.P. Oil Corp., supra,* 531 F.2d at 670.

[6] Before the President could remove a petroleum product from the list of products under active price control under the EPAA, he or his delegate was required to transmit to Congress an "energy action," 15 U.S.C. §760a(c)(2); 42 U.S.C. §6421(a)(6). *See, e.g.,*

Petitioners' second argument is that this action arises under the explicit preemption provision of the EPAA, 15 U.S.C. §755(b),[7] and that actions under section 755(b) are not within the appellate jurisdiction of the TECA. This argument misconstrues the plain language of the applicable statutes.

The TECA has exclusive appellate jurisdiction over cases arising under regulations, orders or actions under the EPAA. Since section 755(b) requires an analysis of EPAA regulations and orders to determine if there is a conflict with a state law, any action "arising under" section 755(b) must also arise under an EPAA regulation or action. An appeal of a holding based on section 755(b) is therefore necessarily within the exclusive TECA jurisdiction contemplated by 15 U.S.C. §754.[8] Petitioners offer no legislative history or judicial decision which remotely suggests a contrary conclusion.

Petitioners' third argument is that an EPAA issue arises only if the EPAA itself or regulations, actions, or

---

Energy Action No. 6, 41 Fed. Reg. 40452 (Sept. 20, 1976) (exempting naphtha jet fuel from mandatory petroleum pricing regulations).

[7] Section 755(b) provides:

> (b) The regulation under section 753 of this title and any order issued thereunder shall preempt any provision of any program for the allocation of crude oil, residual fuel oil, or any refined petroleum product established by any State or local government if such provision is in conflict with such regulation or any such order.

[8] In addition, the District Court held that the Connecticut statute was preempted by the EPAA and its implementing regulations although the express preemption provision of section 755(b) was not applicable. 492 F. Supp. 1014 n. 11, Pet. App. 25a, *citing Jones* v. *Rath Packing*, 430 U.S. 519, 540-41 (1977). Thus, even if Petitioners were correct that the TECA does not have jurisdiction over cases arising under section 755(b), their argument would not apply to this case.

orders thereunder are "directly questioned." Pet. 13. Nowhere in the statute, its legislative history or case law is there any support for this assertion. Indeed, Petitioners once again completely fail to offer any analysis or support for their mutation of the "arising under" standard. The courts have uniformly held that an EPAA issue exists and vests exclusive jurisdiction in the TECA in any case involving "application and interpretation of the EPAA . . . ." *Citronelle-Mobile Gathering, Inc.* v. *Gulf Oil Corp., supra; Mountain Fuel Supply Co.* v. *Johnson, supra; M. Spiegel & Sons Oil Corp.* v. *B.P. Oil Corp., supra.*[9]

Petitioners' final argument for granting their petition on the preemption issue is that "consistency of opinion and maximization of TECA's expertise . . ." are not involved in the question of whether the EPAA preempts section 13(b). Pet. 14. Once again no support exists for this contention. The very case the Petitioners cite, *Chicago and Northwestern Transportation Co.* v. *Kalo Brick & Tile Co.*, 49 U.S.L.W. 4232 (1981), states that the federal statute's "construction" must be determined in a preemption case. If preemption requires a federal construction, then an EPAA preemption question absolutely requires the TECA's expertise because resolution depends upon the EPAA, its legislative history and the regulations promulgated thereunder. The TECA is the court most familiar with the EPAA, its regulations, and the amendments thereto and is uniquely qualified to resolve the question. Moreover, as the District Court

[9] Moreover, this interpretation is consistent with the interpretation given to "arising under" in other jurisdictional sections of the judicial code. *See, e.g., Shulthis* v. *McDougal*, 225 U.S. 561, 569 (1912); *Ivy Broadcasting Co.* v. *AT&T*, 391 F.2d 486, 492 (2d Cir. 1968); *T. B. Harms Co.* v. *Eliscu*, 339 F.2d 823, 828 (2d Cir. 1964), *cert. denied*, 381 U.S. 915 (1965).

found, state price control statutes of the Connecticut variety create "artificial market conditions" and risk "the very 'supply problems' and 'market distortions' " that are inimical to federal energy policy. 492 F. Supp. at 1014, Pet. App. 26a. Such statutes pose a national problem, and the preemption issue is thus properly presented to a court with a national jurisdiction over EPAA pricing rules.[10]

B. The Temporary Emergency Court of Appeals had exclusive jurisdiction over the abstention issue

The Court of Appeals refused to hear Petitioners' claim that the District Court should have abstained under the doctrine of *Railroad Commission* v. *Pullman,* 312 U.S. 496 (1941), because

> a decision to abstain in this case would necessarily involve a finding that some possible interpretation of Section 13(b) would render the provision consistent with the federal regulatory framework. Such a finding, however, would necessarily entail some analysis of the federal and state statutes and regulations. Thus we will defer to TECA's particular expertise in this area.

639 F.2d at 922, Pet. App. 6a. The Court of Appeals was clearly correct. Abstention is warranted only if some

---

[10] Petitioners rely on two state court cases as supporting the proposition that the preemption issue does not "present an EPAA issue". Pet. 11-12, *citing Maryland* v. *Exxon Corp.,* 370 A.2d 1102 (Md. 1977), *aff'd on other grounds,* 437 U.S. 117 (1978), and *ARCO* v. *Tribbit,* 399 A.2d 535 (Del. Ch. 1977). This argument is frivolous. The jurisdictional issue was not decided in, mentioned by, nor (to all appearances) even presented to the state courts in these cases. Under these circumstances, the cases cannot possibly be read as authority for the view Petitioners urge.

reasonably plausible interpretation of the state statute at issue will render it consistent with the requirements of federal law.[11] *Harman* v. *Forssenius,* 380 U.S. 528, 535-36 (1965). Making that determination in this case would have required the Court of Appeals to analyze the requirements of the EPAA, but Congress has limited appellate analysis of the EPAA to the TECA in order to achieve "national uniformity [and] consistency of decision." *Bray* v. *United States, supra,* 423 U.S. at 74-75.

In addition, the analysis required on the abstention issue, involving interpretations both of the EPAA and section 13(b) of Connecticut Public Act 80-71, was the same analysis required on the preemption issue. *See* pp. 3, 8-9 *supra.* Since the TECA had exclusive jurisdiction over the preemption issue, assertion of jurisdiction by the Court of Appeals over an abstention issue requiring analysis of the same two statutes would have been a waste of judicial resources.[12]

---

[11] The interpretation of section 13(b) on which Petitioners based their abstention argument in the courts below would limit the reach of that statute to products not within the definition of "petroleum products" in section 4 of the EPAA, 15 U.S.C. §753. This proposed construction would avoid federal preemption claims by rendering section 13(b) inapplicable to the products sold in Connecticut by Respondents, but it would do so by making section 13(b) not applicable to anything.

[12] The Court of Appeals was also correct in basing its refusal to review the abstention claim on its conclusion that abstention was a "threshold issue which has no life apart from the substantive [preemption] claim." 639 F.2d at 921, Pet. App. 6a. *Quincy Oil Inc.* v. *F.E.A.*, 620 F.2d 890, 893 (TECA 1980) (mootness); *Standard Oil Co.* v. *D.O.E.*, 596 F.2d 1029 (TECA 1978) (ripeness); *City of New York* v. *New York Tel. Co.*, 468 F.2d 1401 (TECA 1972) (exhaustion of administrative remedies).

III. The Appeals Court Properly Held That 28 U.S.C. §1341 Did Not Bar The District Court Actions

Petitioners' obvious lack of belief in their 28 U.S.C. §1341 argument is appropriate in light of the extremely thorough severability clause contained in Connecticut Public Act No. 80-71, Conn. Gen. Stat., §12-601 (1981), Pet. App. 45a. As the Court of Appeals noted, "it cannot seriously be argued that the judgment of the court below has enjoined, suspended, or restrained the assessment, levy or collection of the gross receipts tax." 639 F.2d at 922, Pet. App. 7a.

IV. Petitioners' Failure To File A Timely Appeal With The Temporary Emergency Court Of Appeals Does Not Warrant Extraordinary Relief By This Court

Petitioners suggest that even if this Court concludes that the decision of the court below was correct, it should nevertheless vacate the decision of the District Court (and presumably that of the Court of Appeals as well) and remand the case to the District Court for the entry of a new judgment which Petitioners could then appeal to the TECA. They seek to justify this request by characterizing the District Court's opinion as an illogical judicial error. A reading of Judge Blumenfeld's careful and exhaustive opinion, 492 F. Supp. 1004, Pet. App. 8a-28a, refutes this characterization. Petitioners also cite cases which dealt with appeals from three-judge federal courts convened pursuant to 28 U.S.C. §2281 where the appellate path was not clear and argue that similar relief should be afforded "where, as in this case, the law was unclear or uncertain as to where the appeal should be taken." Pet. 19.

The difficulty with Petitioners' argument is that the law was neither unclear nor uncertain as to the manner

of perfecting an appeal from the judgment of the District Court in a risk-free procedure. The simple fact is that the Petitioners failed to follow crystal-clear guidance by the Second Circuit, the Court in which they lodged their appeal. The Second Circuit, a year before the decision of the District Court, explicitly told counsel facing the issue that:

> Uncertainty and the risk of appeal to the wrong court can be avoided by filing two notices of appeal, one in the district court to appeal to the Court of Appeals, Fed.R.App.P.3(a), and one in the TECA to appeal to that Court, Gen.R.T.E.C.A. 15(a).

Coastal States Marketing, Inc. v. *New England Petroleum Corp., supra,* 604 F.2d at 186 n. 9.

Despite this warning and the absence of any unsettled jurisdictional questions with respect to the preemption and abstention issues, the Petitioners ignored the appellate jurisdiction of the TECA. By contrast, Petitioners in the companion case, *Mobil Oil Corp.* v. *Tully,* followed the clear directions of the Second Circuit and filed two notices of appeal. Their argument on the preemption claim was heard by the TECA on April 2, 1981.

There is no sufficient excuse for Petitioners' failure to appeal to the TECA within the time allowed by Congress, ESA §211(b)(2), 12 U.S.C. §1904 note, to justify the extraordinary relief that Petitioners request. *See Harris Truck Lines* v. *Cherry Meat Packers,* 371 U.S. 215, 217 (1962); *United States* v. *Robinson,* 361 U.S. 220 (1960); *United States* v. *Cooper,* 482 F.2d 1393,

1399-1400 (TECA 1973); *Reed* v. *Kroger Co.*, 478 F.2d 1268 (TECA 1973).[13]

The contrast between this case and the three-judge court cases on which Petitioners rely is clear. The earlier decisions of this Court, in which, on direct appeal, the judgment below was vacated for the entry of a new judgment from which a proper appeal could be taken to a court of appeals, were cases in which a three-judge district court had been erroneously convened and in which a decree granting or denying relief on the merits had been entered. *Gully* v. *Interstate Natural Gas Co.*, 292 U.S. 16 (1934); *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.*, 292 U.S. 386 (1934); *United States* v. *Corrick*, 298 U.S. 435 (1936); *International Ladies' Garment Workers' Union* v. *Donnelly Garment Co.*, 304 U.S. 243 (1938); *William Jameson & Co.* v. *Morgenthau*, 307 U.S. 171 (1939); *Phillips* v. *United States*, 312 U.S. 246 (1941); *Mitchell* v. *Donovan*, 398 U.S. 427 (1970); *MTM Inc.* v. *Baxley*, 420 U.S. 799 (1975); *Butler* v. *Dexter*, 425 U.S. 262 (1976).

Indeed, in several of these cases, the three-judge courts had actually granted relief which this Court held they had no jurisdiction to grant. The consequences of a mere dismissal of a direct appeal under 28 U.S.C. §1253 or its predecessors would have been to let stand an erroneous decree entered by a court having no jurisdiction, a situation expressly recognized by this Court. *United*

---

[13] In *Reed* v. *Kroger Co.*, *supra*, 478 F.2d at 1271, the TECA stated:

> In an effort to justify the complete absence of professional care, counsel blandly claims reliance upon the oral advice of a district court clerk. We strongly believe that professional standards require counsel to be familiar with, or to make at least a reasonable effort to learn, the rules of the courts in which they practice.

States v. *Corrick, supra; International Ladies' Garment Workers' Union* v. *Donnelly Garment Co., supra.* In addition, these decisions were grounded upon the Court's power to enforce the limitations upon its own jurisdiction by direct appeal. *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co., supra; William Jameson & Co.* v. *Morgenthau, supra; Gully* v. *Interstate Natural Gas Co., supra.*

In light of the foregoing, therefore, no basis has been shown for requesting this Court to vacate the judgment below. If the decision is incorrect, certiorari jurisdiction is available to enable this Court to rectify any error, if deemed appropriate; if the decision is correct, there is no justification for vacating a proper judgment in order to enable Petitioners to remedy their own delinquency in failing to file a timely notice of appeal to the court having proper appellate jurisdiction.

CONCLUSION

For the reasons stated herein Respondents respectfully request that the petition for certiorari be denied.

Respectfully submitted,

RICHARD M. REYNOLDS
ALLAN B. TAYLOR
PHILIP M. SMALL
DAY, BERRY & HOWARD
Of Counsel

WILLIAM E. GLYNN
One Constitution Plaza
Hartford, CT 06103
(203) 278-1330

Counsel of Record For
Mobil Oil Corporation
Amoco Oil Company
Getty Refining and Marketing Company
Gulf Oil Corporation
Sun Oil Company of Pennsylvania
Atlantic Richfield Company
Chevron U.S.A. Inc.
Exxon Corporation
Shell Oil Company

ERIC WATT WIECHMANN
JOSEPH D. MAGRI
CUMMINGS & LOCKWOOD
Of Counsel

FRANCIS J. MCNAMARA, JR.
10 Stamford Forum
Stamford, CT 06904
(203) 327-1700
Counsel of Record For
Texaco Inc.

ROBERT H. ELLIOT
CAPLIN & DRYSDALE
ARTHUR S. SACHS
SACHS, SACHS, DELANEY & SACHS.
Of Counsel

MYRON C. BAUM
1101 17th St. N.W.
Washington, D.C. 20036
(202) 862-5000
Counsel of Record For
Amerada Hess Corporation

May, 1981